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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of )

1998 Biennial Regulatory Review )

Streamlining of Mass Media Applications, )

Rules and Process )

MM Docket No. 98-43

To: The Commission

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COMMENTS OF DAVID TILLOTSON

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### **Summary**

Commentor generally supports the proposals for electronic filing of Mass Media applications. However, Commentor is opposed to making electronic filing mandatory until such time as use of the Internet is as routine and universal as use of the telephone.

Commentor opposes the proposals to "streamline" Mass Media applications by substituting yes/no questions and certifications for the current requirement that applicants submit substantive information relevant to an evaluation as to whether grant of their applications would serve the public interest. Commentor's opposition is based on the fact that the substantive information is needed in order for the Commission to discharge its statutory obligations and in order to enable interested parties to monitor and participate in the consideration of applications. For this same reason, Commentor opposes the proposal to eliminate the requirement that sales contracts be submitted with assignment and transfer applications. Eliminating the requirements that applicants provide the substantive information on which a determination as to whether grant of their applications would serve the public interest and the requirement that sales contracts be filed would not relieve applicants of any burden or "streamline" the preparation of applications. The only burden that the elimination of such requirements would lift is the burden on the Commission's staff to review information that is essential to evaluating whether grant of an application is in the public interest.

Based on the Commission's belief, as reflected in the Notice of Proposed Rule Making, that it need not review substantive information in order to determine whether grant of an assignment or transfer application is in the public interest, Commentor counter proposes that rather than take the half measure of reducing applications to yes/no questions and certifications, the Commission request that Congress amend the Communications Act to eliminate the requirement for prior Commission consent to assignments and transfers. Since the Commission would leave it to assignees and transferees to make the determination as to whether acquisition of a station license or control of a licensee was consistent with the Communications Act and the Commission's Rules, the logical "streamlining" change would be to allow assignments and transfers to take place on notification to the Commission with the Commission possessing the power to require that transactions which are not in compliance with the Act and its Rules be undone.

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To: The Commission

**COMMENTS**

These Comments are being submitted by David Tillotson, an attorney who has been practicing before the Commission with a focus on Mass Media matters for more that a quarter century, in response to the Notice of Proposed Rule Making in the above-captioned proceeding.

**A. Electronic Filing of Applications**

**General Comments Concerning Electronic Filing**

Commentator supports the proposal to enable parties to file broadcast applications electronically. Adoption of the proposal should facilitate both the filing of applications and the retrieval of information contained in applications. Once fully implemented, electronic filing should greatly reduce the amount of paper filed with the Commission, saving resources for handling and storing the paper, and also benefitting the environment by reducing the destruction of trees for the manufacture of the paper needed for conventional filings.

Commentator's support for electronic filing is predicated on the assumption that the FCC's electronic filing system will be

set up in such a way that: (i) anyone with access to the Internet via computer will be able to access the application forms, download them to a computer and complete them off-line without purchasing any special software; (ii) it will be possible to print the downloaded applications to a standard printer so that they can be prepared by third parties and sent via mail, fax or Email, to the person or persons who is to review them for completeness and accuracy and (iii) the third party preparer, usually an attorney or engineer, will be able to make the filing on the applicant's behalf. If these assumptions are not valid, then Commentator would oppose electronic filing on the grounds that it would make application preparation more rather than less burdensome for the applicants.

While Commentator supports electronic filing, he opposes making electronic filing mandatory now or anytime soon. While use of the Internet is growing rapidly, there are a large number of small businesses and individuals that still do not use computers, let alone surf the Web. If electronic filing were made mandatory, many small broadcasters would be required to hire attorneys or others to prepare and file applications that they could file the old fashioned paper way themselves. Until Internet usage and access is as universal as using a telephone, applicants should have the option of making paper filings. Rather than create categories of businesses that would be exempt from electronic filing, the Commission should at least for several years let all applicants decide whether to file

electronically or not. Those who have the computer technology and know-how to file electronically will certainly do so as the savings in paper and shipping will be enough to induce anyone capable of using the electronic filing option to do so. The Commission can limit the burden that the continuation of paper filings by parties who are not yet ready to enter the electronic filing era would otherwise have on its resources by setting procedures to scan all applications filed on paper into its electronic system.

#### **Applicant Identifiers**

To date, the Wireless Bureau's campaign to register TINs with call letters has been something of a fiasco, with the Bureau sending out notices to registrants that the call letters for their main facilities have been deleted and rejecting registrations because the licensee names do not match the call letters listed in their TIN registrations. The problem with the Wireless Bureau's system is that the data base that it is using is hopelessly out of date. Whatever the Mass Media Bureau does with respect to applicant indentifiers, it should take care not to duplicate the problems associated with the Wireless Bureau's TIN registration campaign which have caused many broadcasters to engage their attorneys to deal with the Wireless Bureau to straighten out the registration problems caused entirely by that Bureau's outdated records.

#### **Signing Applications**

Implicit in the electronic filing proposal is the

elimination of the requirement that applications be signed, or at least that the signature on applications be "original."

Commentator recalls having seen some reference in the Notice to allowing applicants to create their own, electronic signatures, but was unable to locate the provision when writing these comments. In view of the significance attached to applicant certifications, it will be necessary to have some reliable means of verifying that a signature is actually that of the person whose it purports to be.

Additionally, in view of the fact that the Commission is proposing a system whereby it will accept applications without "original" signatures, it should for the sake of consistency as well as the sake of "streamlining" eliminate the requirement that signatures on applications, amendments to applications, and drug certifications be "original" and begin accepting signatures on documents transmitted by facsimile as well as any other electronic means. If the Commission were to accept fax signatures, this would simplify and expedite the filing of application amendments and requests for special temporary authority which under current staff interpretations of the Section 73.3513 of the Rules must be ink originals.

#### **B. Streamlining Application Process**

##### **(i) Problems with the Commission's Streamlining Proposal**

###### **(a) The Proposal to Rely on Certifications in Lieu of Substantive Information**

The Commission's proposals for "streamlining the application

process" rest primarily on shifting the burden from the Commission's staff to applicants to make crucial decisions as to whether an application satisfies requirements of the Communications Act (the "Act") and the Commission's Rules. It appears to Commentator that the proposals were designed primarily as a means to reduce the Commission's staffing requirements for processing applications while at the same time *maintaining the appearance* that the Commission continues to exercise its statutory responsibility to make certain that grants of applications serve the public interest.

Commentator submits that an inquiry into how to streamline the application process should not begin with what can be done to reduce the Commission's staffing requirements, but rather, with what information does the Commission legitimately require in order to make the requisite public interest determinations when acting on applications. If information is relevant to the public interest analysis, the Commission should require that it be provided, and should employ the staff necessary to review it. If the information is not relevant, then questions which call for the information should be eliminated.

The notion that the Commission can discharge its regulatory responsibilities by simply requiring that applicants certify as to relevant information is, in a word, absurd. First, as Commissioners Ness and Tristani correctly pointed out in their *Joint Press Statement Regarding the Mass Media Bureau's Approval*

*of Assignment and Transfer in Redding, CA* released May 29, 1998, the Commission's statutory duty to determine whether grant of an application would serve the public interest cannot properly be discharged by having applicants certify as to certain facts. In the Redding, California, assignment case that Commissioners Ness and Tristani discussed in their *Joint Press Statement*, the parties to the application in question could have certified truthfully that the proposed acquisition fully complied with the Commission's multiple ownership rules. Nevertheless, Commissioners Ness and Tristani believed that the degree of market dominance that would result from the proposed license assignments required the Commission to consider whether, notwithstanding compliance with the multiple ownership rule, grant of the assignment application would serve the public interest. Had one more Commissioner agreed with them, presumably such an inquiry would have been undertaken, and possibly the assignment application would have been denied as not in the public interest. If the proposed "streamlined" process is adopted, assignment applications will not contain any information concerning the radio markets in which the stations to be assigned operate, and thus neither the Commission nor members of the public will have any the sort of information needed to raise questions as to whether, notwithstanding compliance with the letter of the multiple ownership rules, approval of a particular assignment application would result in undue market concentration or otherwise not be in the public interest.

Second, applicants acting in good faith with the benefit of instructions and checklists can and do make mistakes. When mistakes occur, if information bearing on the reliability of the certification is contained in the application, the mistakes are usually caught by the Commission's staff and often are caught by other interested parties. For example, recently a client of Commentator certified in good faith that there was no principal city coverage overlap between stations that it owned and one that it was acquiring. The Commission's staff noted that the station being acquired was geographically close to one of the stations already owned and requested maps showing that there was no overlap. When the maps were reviewed, the client discovered that he had been mistaken and that there was in fact overlap between the station being acquired and one that he owned. He then submitted a full multiple ownership showing to establish that, despite the overlap, the acquisition complied with the multiple ownership rules. Had the application not called for information as to stations the Assignee currently owned, the error would not have been detected by the Commission's staff or any interested party and, if the overlap had resulted in the acquisition being barred by the multiple ownership rules, this fact would have been missed and the acquisition would nevertheless have occurred.

As the Commission's staff responsible for processing assignment and transfer applications can tell the Commission, errors in multiple ownership certifications and other aspects of showings contained in applications are not uncommon. If the basic

information underlying a certification is contained in an application, the staff and interested parties can readily catch errors and, thus, ensure, that the errors are corrected and that the public interest determination that must be made in acting on the application is based upon reliable information. If the information is not provided, it is unlikely that errors in certifications, whether intentional or innocent, will be detected.

If an acquisition not in compliance with the multiple ownership rules were to occur following a final Commission consent to the acquisition predicated on an erroneous certification, the Commission could not simply order the transaction to be unwound. Rather, the remedies available to the Commission for the multiple ownership violation would be either to commence a license revocation proceeding or to assess a fine for the violation. Revocation proceedings are time consuming and costly, so it is safe to assume that in most cases where an acquisition that violates the multiple ownership rules were to occur, the Commission would settle for a fine.

The Commission is clearly mistaken in its belief that replacing its existing requirements that application submit substantive information in exhibits with certifications and "yes/no" questions would "benefit broadcasters [and] the public." Both the public and broadcasters would actually be disserved by adoption of the proposal as it would deprive them of the type of specific information concerning an applicant's qualifications

that they need in order to petition to deny applications which are not in compliance with the Commission's rules or the Act or which are otherwise inconsistent with the public interest.

While broadcasters and the public would benefit from better application instructions and worksheets to help clarify Commission processing standards and rule interpretations, neither broadcasters or the public will derive any benefit from broadcasters not being required to file the information that they gather on the worksheets. Not requiring applicants to file the worksheet information does not relieve applicants of any "burden," as the burden, such as it is, is in gathering the information and completing the worksheets, not in sending the information to the Commission. Additionally, in so far as the physical submission of the sort of information that applicants are currently required to provide in exhibits is any "burden," the burden will be virtually eliminated with the advent of electronic filing. Since applicants will need to go through the exercise of gathering information and completing worksheets in order to answer the certification and "yes/no" questions on application forms, there is no plausible reason not to require that worksheets be submitted with applications.<sup>1</sup> Requiring submission of the worksheets will ensure that they are actually completed and are completed with care, and it will enable the

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<sup>1</sup>The only apparent reason for suggesting that the information that would be compiled on the worksheets not be submitted is so that the Commission will not need to devote staff resources to reviewing the information.

Commission's staff and interested parties to evaluate the accuracies of the certifications and the answers to the questions on the form.

#### **The Proposed New and Expanded Certification Requirement**

The Commission's proposal to "require each applicant to certify that it has read the instructions and disclosed fully in exhibits all matters about which there is any question regarding full compliance with the standards and criteria set forth in the instructions" adds nothing of substance to the certification which is already a standard part of every FCC application<sup>2</sup> and reflects a deep misunderstanding by the Commission as to how applications are prepared and executed in the real world. Most applicants are legal entities, not individuals, and many of the legal entities are large corporations with many tiers of officers and responsibility. Typically both individual and corporate applicants rely extensively on attorneys and engineers to read and understand instructions for preparing applications and other forms and to prepare applications for them. Knowing that the person responsible for reviewing and signing an application is not likely to read the application form with care, let alone read and comprehend the instructions, attorneys carefully gather the

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<sup>2</sup>Applicants are currently required to certify that statements made in their applications "are true, complete, and correct to the best of my knowledge and belief and are made in good faith," and they are warned in bold print that "willful false statements. . . are punishable by fine and/or imprisonment . . . and/or revocation of any station license or construction permit."

information needed to complete applications by going to the persons within the applicant entity who will know the answers to the questions and by discussing specific questions and answers with responsible officials of the applicant. The end result produces applications which are complete and accurate. The basic way that applications are prepared will not change simply because the Commission adds a requirement that the applicant "certify" that it has read the instructions (and presumably understood them) and that the information provided is complete and accurate. The applicant principal responsible for signing will simply continue to rely upon the advice of the attorney that he or she can sign the certification.

The proposal to use sanctions as a means of ensuring that the representations contained in applications is truthful is not in the interest of applicants and will do little to ensure that representations in applications are truthful. Under the present system where an applicant submits the substantive information that the Commission needs to determine whether grant of an application is in the public interest, an applicant runs little risk that it will be fined or that its application will be designated for hearing as a consequence of an error in the information provided. If information is incomplete or incorrect, applicants are simply required to supply complete or corrected information. Under the Commission's proposal, with enforcement actions to scare applicants into being "honest" substituted for requiring applicants to submit substantive information that can

be checked, an innocent, or careless, mistake by an applicant would be elevated into a serious offense requiring some sort of enforcement action.

The Commission's experience in the 1980's with financial and site certifications should have taught the Commission that it cannot rely on applicants to provide truthful certifications regarding matters fundamental to a finding that they are qualified to hold broadcast licenses does not work. Moreover, the experience with financial and site certifications also should have taught the Commission that severe sanctions for false certifications will not ensure the accuracy of certifications, especially when the risk of being caught in a false certification is extremely small. Additionally, the administrative burden of trying to ensure honest answers to application certifications and questions by bringing enforcement action would be enormous. If it is believed that an applicant provided false information, the nature and the magnitude of the sanction would turn on a determination as to whether the applicant did so knowingly and with "intent to deceive," or whether the false information was provided due to a misunderstanding or carelessness. Such determinations often will involve issues of fact that cannot be resolved without some form or hearing. Using spot checks and enforcement actions to encourage accurate certifications will consume amounts of Commission and applicant resources vastly out of proportion to any benefit that will be derived from the fact that the threat of sanctions may result in more somewhat more

reliable certifications.

**(b) Eliminating the Requirement that Contracts be Filed**

In connection with its proposal to eliminate the requirement that contracts be filed with assignment and transfer applications, the Commission "recognize[s] that any processing changes must not impede [its] ability to discharge its obligation under Section 310(d) of the Act to grant only those applications that serve the public interest . . . and must preserve the public's ability to monitor and participate in the consideration of sales applications." If the Commission seriously means what it has stated in these regards, it must not eliminate the requirement that contracts be filed.

As the Commission itself notes, contracts relating to ownership structures, financing and management are often complex. Such contracts also often are designed to skate around the edges of the Act and the Commission's rules. The only way that the Commission can determine whether specific complex transactions are inconsistent with the rules and the public interest, and the only way that the public can monitor contractual relationships and participate in a meaningful way "in the consideration of sales applications" is if the sales contracts are submitted with the applications. Checklists and applicant certifications based upon checklists are poor substitutes for the actual contract documents. Reserving the right to "request copies of agreements on a case-by-case basis where disclosures made in an application raise concerns" does not begin to address the problem since the

yes/no certifications that the Commission's is proposing to substitute for substantive information will rarely if ever reveal any information that would cause the Commission concern.

Not long ago, the undersigned represented a client in petitioning to deny the acquisition of radio stations by an individual who was resigning his position as the General Manager of a television station in the same market to purchase the stations with a loan from the licensee of the television station. In consideration of the loan, the purported purchaser of the radio stations had granted an option to the television station to acquire an substantial equity interest in the radio stations. A joint sales arrangement, not an LMA, was also contemplated. Before approving the transaction, the Commission's staff required the purchaser of the radio stations to submit additional information concerning his financial and business relationships with the television station and obtained assurances that there would be no joint sales or joint operating arrangement. If the Commission's proposed "streamlined" assignment application had been in place, the information which served as the basis for a petition to deny and which raised sufficient concerns about a violation of the multiple ownership rules and/or cross interest policy for the staff to require additional submissions from the applicant to allay these concerns would not have been available and it is a virtual certainty that the television station and its former General Manger/Debtor would now be operating under a "joint sales" agreement.

More recently, the undersigned was asked to provide information concerning the scope and duration of a covenant not to compete referred to in a purchase agreement. The staff explained that they needed the information to determine whether the covenant not to compete complied with Commission policies. If those policies and others, such as the cross interest policy, the prohibition against reversionary interest, and the prohibition against security interests in license, are still relevant, then the Commission needs to continue to require that contracts be filed so that it and the public will be able to evaluate whether proposed transactions are consistent with the Act and the Commission's rules and otherwise serve the public interest.

**(c) Eliminating the Requirement that Contour Maps  
Be Filed**

Applicants would not be relieved of any "burden" by the proposal to eliminate the requirement that contour maps demonstrating compliance with the multiple ownership rules be filed with assignment and transfer applications as applicants would still be "burdened" with the expense and effort of preparing such maps to complete a local ownership certification worksheet. Here again, the only "burden" that would be lifted by eliminating the requirement that contour maps be filed is the burden on the Commission's staff of reviewing the maps to confirm that applicants' multiple ownership certifications are accurate. Commentor believes that the Commission should either continue to

bear this burden, along with the burden of reviewing all other information relevant to the discharge of its statutory obligation or it should adopt Commentor's streamlining counterproposal set out below which would get the Commission entirely out of the business of reviewing assignment and transfer applications.

If the Commission were to eliminate the requirement that contour maps be filed in connection with multiple ownership showings, it definitely exempt applicants who can demonstrate compliance with the multiple ownership rules without reference to contour maps from any obligation to prepare contour maps relating to multiple ownership and place them in their public files.

**(ii) An Alternative Streamlining Proposal**

If the Commission truly believes that it can discharge its statutory responsibility to ensure that assignments and transfers of station licenses are in the public interest by relying upon applicant checklists, the Commission should not waste time and efforts on "streamlining" half measures. Rather, it should take the logical next step and ask Congress to repeal the requirement of Section 310(d) that the Commission approve assignments and transfers in advance and to imbue the Commission with the authority to order parties to divest licenses or control of licensees without hearing in cases where acquisitions violate the Act or the Commission's Rules. Since the Commission proposes to rely on the honesty and integrity of applicants, backed by sanctions, to ensure that assignments and transfers are in compliance with the Act and the Commission's rules, no useful

purpose is served by retaining an application and approval process. Rather than file an application and wait for the Commission to approve it, parties should be able to acquire licenses and control of licensees by simply notifying the Commission that they have done so and certifying that the acquisition complies with the Commission's rules and the Act. If the Commission were granted the authority to require divestitures and/or cancel or revoke licenses, in cases where acquiring parties incorrectly certified compliance, whether intentionally or inadvertently, acquisitions that did not fully comply with the Act and the Commission's Rules would be rare.

Respectfully submitted,

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